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IN THE

Supreme Court of the United States

No. 546

OCTOBER TERM, 1957

IN RE: APPEAL OF JOSEPH RETENELLER

APPEAL FROM THE SUPREME COURT OF PENNSYLVANIA

JURISDICTIONAL STATEMENT

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No.

October Term, 1957

In re: Appeal of JOSEPH RETENELLER

APPEAL FROM THE SUPREME COURT OF PENNSYLVANIA

JURISDICTIONAL STATEMENT

Appellant appeals from the order of the Supreme Court of Pennsylvania, entered on April 29, 1957, discharging a rule to show cause why its order of February 5, 1957, should not be vacated and for remission of the record to the Court of Common Pleas for consideration of the procedural defects in the hearings before the Civil Service Commission of Philadelphia. The Civil Service Commission had found that the Police Commissioner had just cause for dismissing the appellant for conduct unbecoming an officer. The Court of Common Pleas reversed the Commission without considering all of the procedural defects alleged on appeal. The Supreme Court of Pennsylvania, on petition of the appellee, without having briefs before it and without oral argument, reversed the Court of Common Pleas on the authority of In Re Addison's Appeal, 385 Pa. 48, which barred an appeal on the merits and upheld the validity and constitutionality of the Philadelphia Home Rule Charter Act. The appellant filed a petition to vacate said

order, requesting that the case be remanded for consideration of the procedural defects in the hearing and findings of the Commission. A rule to show cause was granted but was discharged by a per curiam order from which this appeal is taken.

OPINIONS BELOW

The order of April 29, 1957 was per curiam and is not reported. The opinion of the Court of Common Pleas No. 7 in the instant case is unreported. A copy of said opinion is printed in the Appendix. The opinion of the court below in In Re Addison is reported in 385 Pa. 48 (1956). The orders of the Supreme Court of Pennsylvania on February 5, 1957 and April 29, 1957 are set forth in the Appendix.

JURISDICTION

The order of the Supreme Court of Pennsylvania was entered on April 29, 1957. Notice of appeal was filed in that court on July 29, 1957. The time for docketing the case in this Court was enlarged by the Court below to October 12, 1957. The jurisdiction of the Supreme Court to review this decision by direct appeal is conferred by Title 28 U.S.C., section 1257(2).

QUESTION PRESENTED BY THE APPEAL

The following question is presented by this appeal:

Has the appellant been afforded due process of law under the 14th Amendment of the Constitution of the United States when the Philadelphia Home Rule Charter, which provided that there shall be no appeal on the merits from the findings and decisions of the Civil Service Commission but there may be an appeal on jurisdictional or procedural grounds (defined by the Annotations to the Charter

(No. 5) to mean lack of jurisdiction, failure of procedural due process and failure to conform with the Home Rule Charter) is so construed by the Supreme Court of Pennsylvania as to bar consideration of procedural defects properly raised in the proceedings, not all of which were considered by the Court of Common Pleas because of a favorable decision on the merits of the case?

STATEMENT OF THE CASE

1. The Facts

The appellant was dismissed by the Commissioner of Police of Philadelphia, Pennsylvania, on the charge of "Conduct Unbecoming an Officer having received money in the years 1949 and 1950 on behalf of Leo "Clee" Coleman, a well-known numbers banker". He appealed to the Civil Service Commission, as provided by Section 7-201 of the Philadelphia Home Rule Charter. His hearing was consolidated, over objection, with the appeals of two other fellow officers, Patrick J. Donahue and Thomas A. Cloran, Jr., similarly charged. The reason for the consolidation was the convenience of the City because the witnesses against the officers were the same, although the events, dates and circumstances of each of the cases were totally different. His appeal was dismissed. On appeal to the Court of Common Pleas, the appeal was sustained and the appellant was ordered reinstated in his position.

The appeal to the Court of Common Pleas set forth eleven exceptions of which three (Nos. 6, 10 and 11) related to the merits of the case and are governed by the Addison case which barred an appeal on the merits. The remaining exceptions (Nos. 1, 2, 3, 4, 5, 7, 8 and 9) relate to procedural due process and were properly assigned for consideration on appeal and were within the framework of permissible appeal under Section 7-201 of the Home Rule Charter. In substance they related to

(No. 1) the failure of the Commission to make its own findings and conclusions (as specifically provided by Section 7-201 of the Charter; (No. 2) refusal to permit the cross-examination of a prosecution witness in order to impeach his credibility; (No.3) refusal of the Commission to grant separate hearings to the appellant; (No. 4) permitting the District Attorney to conduct the appeal instead of the City Solicitor, as required by Section 8-410 of the Home Rule Charter; (No. 5) going outside the record to find facts; (No. 7) failure to consider character evidence on behalf of appellant as a factor in the decision; (No. 8) the Commission's reliance on its own knowledge rather than on proved facts; (No. 9) refusal of the Commission to state whether it believed the witnesses for the City.

The Court of Common Pleas not only determined the case favorable to the appellant on the merits but discussed and favorably ruled on exception No. 1 which dealt with the failure of the Commission to exercise its own judgment and make its own findings, as required by Section 7-201. Exceptions Nos. 5, 7, 8 and 9, relating to procedural questions, were not discussed but were ruled on favorably by the court. The court did not pass upon exceptions Nos. 2, 3 and 4, relating to the refusal of the Commission to permit appellant's counsel to cross-examine a principal prosecution witness in order to impeach his credibility, the refusal by the Commission to grant a separate hearing to the appellant and in permitting the Assistant District Attorney to conduct the appeal rather than the Assistant City Solicitor, as required by the Charter.

The City of Philadelphia appealed to the Supreme Court of Pennsylvania which, on the authority of In Re Addison, 385 Pa. 48, and without submission of briefs or argument, reversed the order of the Court of Common Pleas. Appellant was not advised by his then counsel of the requirement of an answer to the city's petition to reverse the order of the Court of Common Pleas. The first

notice he had was a letter dated February 5, 1957, advising him that the Supreme Court of Pennsylvania had entered a rule to the effect that the lower court's decision be reversed and that the Civil Service Commission should be sustained. He was then told that unless they could present some reason why this should not be done within the next 10 days, the rule would be made absolute and the case would be closed. While not fully appreciating what he could do, he ultimately sought and obtained new counsel the day before the expiration of the 10 day period after which the record was required to be returned to the lower court. Appellant's new counsel then filed a petition with the Supreme Court of Pennsylvania to reconsider its order granting the city's petition to reverse the Court of Common Pleas, for leave to answer the petition of the city for a ruling reversing the order of the Court of Common Pleas, and to remand the case to the Court of Common Pleas for consideration of the procedural defects raised in the exceptions to the adjudication of the Civil Service Commssion. A rule to show cause was issued which, after an answer filed by the City and a replication by the appellant, was discharged. This appeal followed.

2. How the Federal Question Is Presented

There can be no dispute that procedural questions were properly raised in this case and, with three exceptions, were favorably passed upon by the Court of Common Pleas. No ruling was made on the others. This case does not involve the question of the "regularity" of the proceedings before the Civil Service Commission, such as notice and the right to a hearing. The question presented is whether the Supreme Court of Pennsylvania, on the authority of In Re Addison's Appeal, supra, which merely decided that under the Philadelphia Home Rule Charter there could be no appeal on the merits, can deny to appellant the right to appeal on pro-

cedural grounds, "procedural grounds" being defined by the Charter as "procedural due process". (See annotation to Section 7-201, note 5, p. 36, infra.) If there was such a denial, then there was a denial of due process of law under the 14th Amendment of the Constitution of the United States.

The appellant in the instant case charged that he was denied the opportunity to cross-examine a principal witness in order to impeach his credibility and to question him as to the motive for testifying against the appellant. (N. T., pp. 89-92, hearing before Civil Service Commission.) The question of motive is material and relevant in these proceedings and also would serve as a means of impeaching the witness's credibility. The fact that the Commission permitted cross-examination as to other points has no bearing on its error in refusing to permit cross-examination on this point. It was reasonable cross-examination and its denial constituted a violation of due process of law. *State Board of Private Business Schools* v. *Thomason*, 66 Dauphin (Pa.) 110 (1954).

The courts have uniformly held that a denial of the right to reasonable cross-examination constitutes a denial of due process of law. In the instant case, the right of cross-examination, however, is only one of the procedural questions raised but not disposed of by the Court of Common Pleas. Another related to the representation of the City at the hearings before the Civil Service Commission by an Assistant District Attorney instead of by an Assistant City Solicitor, particularly the Assistant District Attorney who prosecuted certain criminal phases involving some of the principal witnesses against the appellant. This placed an aura of suspicion as to the involvement of the appellant in criminal acts. Consciously or not, it could not help but be a persuasive factor in the consideration given to appellant's case by the Civil Service Commission. This possibility was foreseen by the framers of the Home

Rule Charter who definitely designated the City Solicitor as counsel for all city agencies and commissions. This provision was designed to remove the pressure and implications which the active participation of the District Attorney or his assistants would create in any civil agency proceeding. This restriction should not be lightly cast aside.

The third exception raised by the appellant and not passed upon by the court related to the consolidation of the hearings of three officers, including the appellant. Counsel repeatedly stated that a consolidated hearing for the three officers was not the proper way to try the cases, but when the Commission insisted that it preferred trying the cases together, counsel stated that he was not going to object if the Commission so wished. This, however, did not constitute a waiver of appellee's right to question the propriety and the fairness, as well as the lack of due process in consolidating the three cases for hearing.

The other procedural questions which were ruled upon favorably by the court were exceptions Nos. 1, 5, 7, 8 and 9. With reference to exception No. 1, the court had this to say:

> "The appellant also raises the contention that the Civil Service Commission failed in this case to perform the duty imposed upon it by the Philadelphia Home Rule Charter. 7-201 of the Home Rule Charter provides: 'Appeals. The Civil Service Commission shall hear and dispose of appeals . . .' The Annotations to 7-201 elaborate on this duty: '1. The major function of the Civil Service Commission is to serve as an appellate tribunal in cases involving employees against whom disciplinary action by dismissal, demotion or suspension has been taken. . . . 5. . . . it is the Commission's duty to decide whether the action appealed from was justified.'

> In this case, the Commission recognized that it was faced 'with conflicting stories—charges on the one hand and denials on the other,' but it reached a conclusion without resolving the conflict. Quoting the Commission's opinion, 'Without indicating how we might resolve that conflict, we believe that the Police Commissioner cannot be accused of arbitrariness or capriciousness by reason of having chosen to believe one set of witnesses rather than the other and, therefore, find he had just cause for disciplining appellants as he did.' Thus, *the Commission did not decide whether the action appealed from was justified, but merely concluded that the conduct of the Police Commissioner was not arbitrary or capricious.* In performance of its duty, however, the Civil Service Commission should have made an independent determination of the justification of the dismissal, and this required a decision by it as to which of the conflicting stories it found to be credible. Therefore, the Commission's duty was not fulfilled, and the appellant's pertinent exceptions are sustained as further ground for our order entered October 17, 1955 sustaining Reteneller's appeal."

Thus, the Court of Common Pleas favorably ruled upon procedural questions which the Supreme Court of Pennsylvania then reversed without briefs or oral argument, solely on the authority of its opinion In Re Addison's Appeal, supra. Since the Addison appeal decided only that there could be no appeal on the merits of a case before the Civil Service Commission but that an appeal could be made on procedural and jurisdictional grounds, the appellant's appeal was, therefore, within the Charter and not governed by said case.

3. The Federal Question Is Substantial

The term "due process of law" under the 14th Amendment of the Constitution of the United States has been pretty well defined.

In *Fleenor v. Hammond*, 116 F. 2d 982, 132 A.L.R. 1241, it was held that due process of law governed any action of a state, whether through its legislature, through its courts, or through its executive or administrative officers. See also *Vogt v. Webb*, 47 F. Supp. 743.

In *People v. Collup*, Cal. App. 161 P. 2d 576, 586, it was held that due process of law contemplates the opportunity and right to cross-examine each witness on all relevant and material matters relating to the witness's testimony and, when that right and opportunity is refused, such refusal constitutes a denial of due process of law.

In *Refoule v. Ellis*, 74 F. Supp. 336, 339 (D.C. Ga.) it was held that the words "due process of law" within the 14th Amendment are intended to secure an individual from arbitrary exercise of powers of government unrestrained by established principles of private rights and distributive justice.

The right to due process in administrative proceedings as well as in judicial proceedings exists in Pennsylvania. *National Automobile Service Corp. of Pa.* v. *Barford*, 289 Pa. 307, 137 A. 601; *Com. ex rel. Chidsey* v. *Mallen*, 360 Pa. 606, 63 A. 2d 49; *Armour Transp. Co.* v. *Pennsylvania Public Utility Commission*, 138 Pa. Super. Ct. 243, 10 A. 2d 86.

Even where a statute provides no right of appeal to the courts from the determinations of administrative tribunals on constitutional grounds, that right will be implied. *Harris* v. *State Board of Optometrical Examiners of Department of Public Instruction of the Commonwealth*, 287 Pa. 531, 135 A. 237.

Constitutional guarantee of due process of law requires

a full and fair hearing even before an administrative tribunal. *U. S. ex rel. Castro-Louzan* v. *Zimmerman*, 94 F. Supp. 22.

With reference to Judge Oliver's opinion, which held that the Civil Service Commission failed to make "an independent determination of the justification of the dismissal", "a decision by it as to which of the conflicting stories it found to be credible", this Honorable Court's attention is called to the case of *U. S. ex rel. Accardi* v. *Shaughnessy*, 347 U.S. 260, 74 S. Ct. 499, 98 L. Ed. —. In that case, it was held that the failure of the Board of Immigration Appeals to exercise its own discretion in determining whether an application for suspension of deportation should be granted was a denial of due process. In the course of its opinion, this Court said:

> "It is important to emphasize that we are not here reviewing and reversing the manner in which discretion was exercised. If such were the case we would be discussing the evidence in the record supporting or undermining the alien's claim to discretionary relief. Rather, we object to the Board's alleged failure to exercise its own discretion, contrary to existing regulations."

The above authorities indicate clearly that the procedural questions raised were not only proper and authorized by the Philadelphia Home Rule Charter but were substantial questions which require determination by the court.

As to those procedural questions which were decided by the Court of Common Pleas, appellant was entitled to be heard by briefs and oral argument before the Supreme Court of Pennsylvania. As to those procedural questions which were not determined by the Court of Common Pleas, the appellant was entitled, at the least, to have the case remanded to the Court of Common Pleas for its considera-

tion of those questions. In either event, the order of the Supreme Court of Pennsylvania, in summarily reversing the Court of Common Pleas on the basis of the Addison case, which was not determinative of the procedural issues raised in the instant case, was a clear denial to appellant of due process of law as defined and ruled on by the above cited cases.

This decision, it allowed to stand, upholds the validity of the Home Rule Charter beyond the extent of its express language and, in fact, contrary thereto.

The tremendous effect of this decision by the Supreme Court of Pennsylvania is to deny the right to the appellant and all others who might have reason to appeal their cases before the Civil Service Commission on "procedural grounds" from pursuing their right of appeal preserved to them by the Charter. This is not an isolated case but specifically affects the rights of approximately 30,000 civil service employees in the City of Philadelphia. Because of the terrific impact of this decision, it will be quoted by courts in other states as indicating that "procedural due process" does not mean what it says but is analagous to "regularity of proceedings". That this was not the intention of the framers of the Charter is so apparent and not denied by the appellee, that to allow this decision to stand would vitally affect the rights of civil service employees under Home Rule Charters in almost every state of the union.

It is, therefore, respectfully submitted that the appellant properly invokes the appeliate jurisdiction of this Honorable Court.

Respectfully submitted,

J. J. KILIMNIK,
Attorney for Appellant.

Appendix

CIVIL SERVICE COMMISSION
City of Philadelphia

Case No. 260
Appeal of PATRICK J. DONAHUE

Case No. 265
Appeal of THOMAS A. CLORAN, JR.

Case No. 259
Appeal of JOSEPH A. RETENELLER

Appeals from action of Police Commissioner heard Tuesday, May 18, 1954 and Thursday, May 20, 1954 at 2:00 p.m. in Room 625, City Hall.

Before:

SIDNEY B. DEXTER
E. LUTHER CUNNINGHAM
LEON I. MESIROV
Commissioners

Appearances:

LEONARD L. ETTINGER, ESQ., *Assistant City Solicito,* and LEON KATZ, ESQ., *Assistant District Attorney,* on behalf of the Police Department

LEMUEL B. SCHOFIELD, ESQ., and SAMUEL GORSON, ESQ., on behalf of the Appellants

OPINION

The cases here involved were three separate appeals from the dismissal by the Police Commissioner of each appellant from his position as a Policeman, the charges in the case of Donahue being:

> "CONDUCT UNBECOMING AN OFFICER:
>
> Specification 1.
>
> In that you have received money in 1950 and the early part of 1951 on behalf of Leo 'Clee' Coleman from Freeman Mitchell, an employee of Leo 'Clee' Coleman, a well known numbers banker and racketer."

in the case of Reteneller being:

> "CONDUCT UNBECOMING AN OFFICER:
>
> Specification 1.
>
> In that you have received money in the years 1949 and 1950 on behalf of Leo 'Clee' Coleman, a well-known numbers banker."

in the case of Cloran being:

> "CONDUCT UNBECOMING AN OFFICER:
>
> Specification 1.
>
> In that you have received money on behalf of Leo 'Clee' Coleman (a well-known numbers banker) during the year 1950 until on or about April 15, 1951."

The cases were consolidated for the purpose of hearing, not because of any relationship between the charges against the respective appellants, but because the cases of the appointing authority depended upon the credibility of the same witnesses. The charges leading to the dismissal of each of the three appellants were so different that there

was no possibility of our confusing testimony with respect to one with testimony with respect to the others, and each of the appellants was in justice entitled to the benefit of any imputation of lack of credibility on the part of the department's witnesses presented in any of the cases. It, therefore, seemed convenient and practical to consolidate the cases for trial.

Only one procedural complaint has been pressed and that relates to our interruption of a line of cross examination of Freeman Mitchell being purused by the appellants' counsel. We ruled at page 92 of the record that the line could not be pursued at that time. At page 114 of the record appellants' counsel was invited to resume the line which he did not then do. The way was open for appellants' counsel to resume the line at any later time in the hearing and, having failed to do so, the prejudice, if any is chargeable to him. Under the circumstances we feel that no procedural error has been committed by us.

The record was voluminous, exceeding 330 pages in length, but in essence represented a rather simple picture. In each case the witness Mitchell claimed that on behalf of Leo "Clee" Coleman he had made periodic payments of bribes to the appellants.

In the case of Reteneller, Mitchell stated that, at Coleman's instructions, beginning in 1948 or 1949, payments approximating $88 per week were made to Reteneller to take care of Reteneller and his colleagues. The payments were made at various places around the block on which Mitchell lived at 1203 Susquehanna Avenue or at his house. The amount of the payment, from time to time, was dictated by Reteneller and the amount of the first payment was confirmed by Coleman whom Mitchell called before actually paying over the money. Mitchell further identified Reteneller as the man who rode in red car No. 23 "I think." In the course of his cross-examination an attempt was made to have Mitchell categorically fix the time and the amounts

of payments made directly to Reteneller during the last quarter of 1950. This effort was not very successful, all that Mitchell said being that he paid Reteneller directly, except for 3 or 4 payments which he made to others. Although for other periods during the time when Mitchell was supposed to have been paying Reteneller he was definite in his statements that he had paid him directly; as to the last quarter of 1950, he refused to be pinned down to a definite statement.

As to Donahue, Mitchell testified that he never knew Donahue until 1950 at which time he was instructed by Coleman to pay Donahue $20 a week, which he continued to do.

With respect to Cloran, Mitchell testified that Cloran approached him and asked him to contact Coleman for the purpose of arranging for payments to be made to Cloran. This Mitchell did and as a result of instructions received began in 1949 to pay Cloran $5.00 a week.

All payments by Mitchell stopped at Christmas in 1950 when he left the employ of Coleman.

In certain respects Mitchell's testimony was corroborated by Dolores Perry with whom, during the entire period here being discussed, Mitchell lived in the relationship of "common-law marriage." Mrs. Perry was Coleman's bookkeeper and sat with Coleman, at wherever his bank was at the time, to receive the returns from the pickup men, one of whom was Mitchell. The pickup men in making their returns would account for the cash they had collected and claim credit, as having been paid "S.O.L.," for the moneys they paid for protection. Mrs. Perry said she remembered that Mitchell had claimed credit for S.O.L. payments to all three of the appellants.

As to Reteneller, she stated that Reteneller frequently came to their home, rang the bell and asked for Mitchell and that on on occasion while in the car with Mitchell she

had seen him leave the car and transfer money to Reteneller. She did not see Reteneller at her home after 1950.

She also testified that Cloran visited their home on many occasions from 1948 to 1951 at which time Mitchell would take Cloran out into the vestibule. On one occasion she saw Mitchell pay Cloran $5.00.

As to Donahue, she saw him only a few times, never at her home, and not prior to 1951. She testified that she herself had never paid any policeman money. On cross examination she stated that she had seen Mitchell pay Donahue once.

Each of the three appellants categorically denied ever having received any funds from Mitchell. Each attempted to establish a motive on the part of Mitchell for "framing" the appellant.

Reteneller asserted that on many occasions he had broken up crap games in which Mitchell was involved and had chased him and warned him to stop his corner lounging. While Mitchell made no direct threats against Reteneller he did on one occasion say that he would find out "whenever I can stand on the corner." Reteneller denied vehemently riding in red car 23, asserting that that car was not even assigned to his district. He did admit, however, having ridden in red car 123, at least for awhile. He could not definitely place the time in which he rode in that car. In passing, we might comment that his recollection of the number of the car in which he himself rode was sufficiently hazy to excuse an error in recollection on the part of Mitchell, whose connection with it was certainly less important to him at that time. Reteneller further established that he was off duty undergoing surgery and convalescing therefrom between October 13, 1950 and December 5, 1950, a period about eight weeks.

Appellant Donahue testified that he was not even in the 12th District, wherein Mitchell resided and operated, at the time of the alleged payments, not having been trans-

ferred there until January of 1951 at which time he was assigned to locales other than Mitchell's. He was first assigned to Mitchell's locale in August of 1951, after which he began to pay particular attention to Mitchell, searched his house on one occasion, and on one occasion arrested a daughter of Mitchell's sister-in-law. It seems to have been established that Donahue's attentions to Mitchell were so distasteful to Mitchell that he used all the power he thought he might have to get Donahue to let him alone, even going so far as to complain to Donahue's superiors on the police force.

As to Cloran, it appeared that Cloran had arrested Mitchell on several occasions, or had given the information which led to Mitchell's arrest. As a result of this Mitchell on several occasions spoke of Cloran in highly uncomplimentary terms.

In addition, testimony was produced which showed that Mitchell was frequently in the toils of the law, that he had been arrested on more than a few occasions, charged with various crimes, that he had been brought back from Atlanta to testify before us while out on bail on a charge of manslaughter, and that an Assistant District Attorney had used the threat of reopening an old homicide charge against Mitchell in order to persuade him to come back to testify. However, Mitchell did appear before us accompanied by his Georgia attorney who, in absence of proof to the contrary, must be assumed to have advised Mitchell of his rights and to have brought to his attention that the threats of the Assistant District Attorney were more threats than real risks.

The evidence clearly indicates that Mrs. Perry was a lady whose moral standards, to put it mildly, did not conform to our socially accepted norm. Nothing indicates she was untruthful.

In dismissing these appellants the Police Commissioner chose to believe the stories told by Mitchell and Mrs.

Perry. In order to reverse him we must determine that he did so arbitrarily and caprciously and that their stories are so incredible, their veracity as witnesses is so lacking, that they cannot possibly be believed.

It is obvious that persons operating beyond the law and paying for protection are persons whose characters are not above reproach. Nor do they make their payments in the presence of witnesses of sterling character. If Mitchell had not been on the fringe of society, he would not have been working for Coleman as a payoff man. If Mrs. Perry had been an honest, completely moral, law-abiding citizen, she would not have been living with Mitchell nor working for Coleman. If they had not belonged to the segment of society to which they do belong, they would not have been paying the policemen. We realize that testimony from characters such as these must be subjected to close scrutiny. That does not mean, at least in our opinion, that for their testimony to be credible there can be no errors or inconsistencies in it, especially the portion developed on cross-examination.

It is perfectly obvious that Mitchell did not keep a complete double-entry system of books in which he recorded his payments to any of the officers and to which he could refer in order to give detailed testimony as to the time and amounts of payments. The fact that Reteneller by his hospitalization and convalescence may have missed making eight collections, whereas Mitchell's testimony indicated that a maximum of four had been missed, does not, in our opinion, render Mitchell's testimony completely incredible. Mitchell's testimony, while quite certain as to the continuity of payments at the end of his career in the Coleman setup, the period of Reteneller's illness. As we have said before, the discrepancy between 23, the number of the car which Mitchell said was Reteneller's, and 123, which Reteneller admitted to be the number of a car he rode at least for a time, is not necessarily conclusive of Mitchell's pre-

varication. Reteneller, who certainly had more reason to remember the cars in which he rode than Mitchell, was quite indefinite as to what cars he rode in and when he rode in them.

Similarly, in the case of Donahue, the fact that he testified that he was not even in Mitchell's district at the time Mitchell said he was paying Donahue, was more or less corroborated by the fact that Mitchell said he did not even know Donahue when Donahue first approached him. But Donahue may have then been collecting for services rendered Coleman elsewhere.

In brief, we feel we are faced with conflicting stories—charges on the one hand and denials on the other. Without indicating now we might resolve that conflict, we believe that the Police Commissioner cannot be accused of arbitrariness or capriciousness by reason of having chosen to believe one set of witnesses rather than the other and, therefore, find he had just cause for disciplining appellants as he did.

Under the circumstances we dismiss the appeals and so certify to the Personnel Director.

/s/ SIDNEY B. DEXTER
/s/ E. LUTHER CUNNINGHAM
/s/ LEON I. MESIROV

February 1, 1955

IN THE
COURT OF COMMON PLEAS No. 7
PHILADELPHIA COUNTY

December Term, 1954 No. 9884

Appeal of JOSEPH RETENELLER, *Appellant*

OPINION

By OLIVER, P. J., November 10, 1955.

Joseph A. Reteneller was a patrolman with the Department of Police, City of Philadelphia, from May 16, 1941, until his dismissal by the Commissioner of Police, on March 26, 1954. The basis of the Commissioner's action was the following charge against appellant: "Conduct Unbecoming an Officer: Specification 1. In that you have received money in the years 1949 and 1950 on behalf of Leo 'Clee' Coleman, a known numbers banker."

On May 18 and 20, 1954, the Civil Service Commission heard Officer Reteneller's appeal, which for the purpose of hearing was consolidated with the appeals of his fellow officers, Patrick J. Donahue and Thomas A. Cloran, Jr. All of the appeals were dismissed.

Following a denial of his appeal by the Civil Service Commission, Reteneller appealed to this court, and the City was granted a rule to show cause why such appeal should not be dismissed. We have decided to uphold the appeal and to discharge the City's rule to show cause.

The principal question involved is whether the Common Pleas Court has the power to review the merits of the case on appeal in view of the limitation contained in Section 7-201 of the Philadelphia Home Rule Charter. This question has been answered in the affirmative by Judge Davis, of C. P. No. 4, in several well-considered opinions with which, after careful study, we are in full accord. See *Philadelphia Civil Service Commission v. Connolly*, 1 D. &

C. 2nd, 399 (1953); *Appeal of Herman S. Tuckman*, C. P. No. 4, June Term, 1954, #2712; and *Appeal of Patrick J. Donahue*, C. P. No. 4, December Term, 1954, #9693. We therefore hold that we have the power and the duty to review the appeal before us on its merits.

The function of the Common Pleas Court in this setting is well stated in *Civil Service Com. vs. Carty*, 86 D. & C. 13 (1953): "... we should not substitute our own wisdom or discretion for that of the Commission or interfere with its action if there is competent supporting evidence." (Citations omitted.) In addition, the opinion in *Phila. Civil Service Com. vs. Connolly*, supra, thoroughly reviews the nature of the evidence required, and holds that "findings of fact must be supported by substantial evidence and the court on appeal shall determine whether they are so supported."

"Substantial evidence" has been thus defined by the Pennsylvania Supreme Court in *Pennsylvania Labor Relations Board v. Kaufmann Department Stores, Inc.*, 345 Pa. 398, 400-401: "All orders and decrees of legal tribunals, including those of administrative boards and commissions, must be supported by evidence sufficient to convince a reasonable mind to a fair degree of certainty; otherwise our vaunted system of justice would rest upon nothing higher than arbitrary edicts of its administrators. 'Substantial evidence is more than a mere scintilla. It means such relevant evidence as a reasonable mind might accept as adequate to support a conclusion;' (*Consolidated Edison Co. v. National Labor Relations Board* 305 U. S. 197, 229.)"

Thus, in order to sustain the action of the Civil Service Commsision, we must search the record for substantial evidence of the charge that the appellant accepted money on behalf of Leo "Clee" Coleman, a known numbers banker. If such evidence exists, the appellant was dismissed for "just cause" in conformity with the Philadelphia Home Rule Charter, 7-303.

To substantiate the charge against the appellant, the

City relied solely on the testimony of Freeman "Buddy" Mitchell and Dolores Perry. Mitchell testified that he worked as a "pickup man" in the numbers racket for Leo "Clee" Coleman during the period 1947-1950. He stated that, beginning in 1948 or 1949, he paid, at the direction of Coleman, $88.00 per week to the appellant for distribution among the police officers.

Dolores Perry was also employed by Coleman, as a bookkeeper. She sat with Coleman wherever his bank was at the time, and her job was to receive the returns of the pick-up men, one of whom was Mitchell. During this period, Mitchell and Mrs. Perry lived together in a "common-law" marital relationship.

Mrs. Perry testified that, as Coleman's bookkeeper, she remembered crediting Mitchell with payments to various policemen, one of whom was the appellant. In addition, she testified that Reteneller was never in her house, but rang the doorbell on several occasions looking for Mitchell. The witness also stated that she saw Mitchell pay Reteneller only once, but her testimony as to this was hazy and uncertain. On cross-examination, Mrs. Perry said that she was sitting in Mitchell's car when she observed Mitchell and the appellant across the street. Mitchell reached into his pocket, and the witness concluded that at this point a payment was made although she did not see any money exchanged. The basis of her conclusion was that since the officer stopped Mitchell on the street it must have been a pay-off.

Reteneller emphatically denied receiving payments and testified to the numerous occasions he chased Mitchell from street corners for gambling. On one occasion Mitchell questioned the appellant's authority and asserted he would "find out whether I can stand on the corner." Further, it was developed that Reteneller was not on duty because of illness for eight weeks, during which time he was accused of receiving payments.

An examination of the possible motives of the City's witnesses and the circumstances under which they testi-

fied, convinces this court that their testimony was highly suspect and not worthy of credence. Freeman Mitchell, an admitted ex-numbers man, bootlegger, and offender of the law on numerous occasions, indicated his disrespect for truthfulness by various inconsistencies in his statements before the Commission and prior thereto at the District Attorney's office. The evidence showed that Mitchell was harassed constantly by the police because of his illegal activities, and finally left this city and state because of his difficulties. This case presented an excellent opportunity to gain revenge, and further, it is to be noted that Mitchell returned from Atlanta, Georgia, where he faces a homicide charge, to testify in this case. Isaiah W. Crippens, Esq., an assistant district attorney, journeyed to Atlanta to persuade Mitchell to return. This was accomplished by concocting a story that Mitchell faced prosecution on an old murder charge in Philadelphia and would be prosecuted if he did not return and testify. Crippens also discussed the Coleman investigation with Mitchell and threatened to involve him therein. As a matter of record, Crippens admitted, "There was no murder charge that we could revive; there was no lottery charge that we could try him on, because he had quit in 1950." Thus, the witness was prompted to testify by fabrications made by the District Attorney, and by fears of future prosecution in Pennsylvania.

Dolores Perry's testimony is also highly incredible. Her description of the alleged payoff was nothing more than a conclusion, and she corroborated Mitchell's testimony only to the extent that she credited him on her books for payments to a number of police officers on behalf of Coleman. Mrs. Perry indicated a complete disregard for matters of importance in her personal life; she did not know whether her first marriage had been annulled or not; she lived with Mitchell without bothering to discuss the possibility of a marriage, and left him for another man when the occasion presented itself. Finally, this witness returned from California to testify in this case at the solicitation of the District Attorney who paid her expenses

and seventy-five ($75.00) dollars a week after her arrival in Philadelphia.

It is recognized by this court that it is extremely difficult in cases of this type for the city to produce witnesses whose character is above criticism, and that payments to police officers are not usually made by law-abiding citizens whose testimony would be unimpeachable. And we agree with the court in the *Connolly* case, supra, at page 423, "The court strongly believes that every member of the police force must be loyal and honest and dedicated to the enforcement of law and order. We are desirous of supporting the police commissioner to the fullest extent in his duty to provide the finest possible police protection for our citizens within the framework of the Home Rule Charter and the laws of Pennsylvana." But where there are obvious inducements and compulsions to testify, the statements of witnesses such as Freeman Mitchell and Dolores Perry must be subjected to the closest scrutiny. Against such testimony, we have the strong denials of police officers who have served honorably for ten years or more. In addition, credible character witnesses appeared in their behalf.

In this instance, we conclude that the evidence presented by the City does not measure up to the substantial evidence required by the law, and that it was error on the part of the Civil Service Commission to deny the appeal of Officer Reteneller. This conclusion is demanded by the record, and serves to reinforce the belief of the law enforcement body that it can relentlessly persue transgressors of the law, fully protected against the shabby and highly incredible accusations that frequently are asserted.

The appellant also raises the contention that the Civil Service Commission failed in this case to perform the duty imposed upon it by the Philadelphia Home Rule Charter. 7-201 of the Home Rule Charter provides: "Appeals. The Civil Service Commission shall hear and dispose of appeals . . ." The Annotations to 7-201 elaborate on this duty: "1. The major function of the Civil Service Commission is to serve as an appellate tribunal in cases involving employees against whom disciplinary action by dismissal, demotion

or suspension has been taken. . . . 5. . . ., it is the Commission's duty to decide whether the action appealed from was justified." (Italics added.)

In this case, the Commission recognized that it was faced "with conflicting stories—charges on the one hand and denials on the other," but it reached a conclusion without resolving the conflict. Quoting the Commission's opinion, "Without indicating how we might resolve that conflict, we believe that the Police Commissioner cannot be accused of arbitrariness or capriciousness by reason of having chosen to believe one set of witnesses rather than the other, and, therefore, find he had just cause for disciplining appellants as he did." Thus, *the Commission did not decide whether the action appealed from was justified, but merely concluded that the conduct of the Police Commissioner was not arbitrary or capricious.* In performance of its duty, however, the Civil Service Commission should have made an independent determination of the justification of the dismissal, and this required a decision by it as to which of the conflicting stories it found to be credible. Therefore, the Commission's duty was not fulfilled, and the appellant's pertinent exceptions are sustained as further ground for our order entered October 17, 1955 sustaining Reteneller's appeal.

By the Court:

(*sgd*) OLIVER, *P. J.*

ORDER

By OLIVER, P. J., October 17, 1955.

AND NOW, to wit, October 17th, 1955, the City's Rule to Dismiss is dismissed; appellant's exceptions one and five to eleven inclusive are sustained; the appeal is sustained, and Joseph A. Reteneller is reinstated to his status as a patrolman with the Department of Police, City of Philadelphia.

By the Court:

(sgd) OLIVER, *P. J.*

IN THE

SUPREME COURT OF PENNSYLVANIA

EASTERN DISTRICT

January Term, 1956 No. 141

In re: APPEAL OF JOSEPH RETENELLER

Appeal of City of Philadelphia

ORDER

Jan. 18, 1957, a rule is hereby entered on Joseph Reteneller, appellee in the above appeal to show cause why the prayer of the within petition[*] should not be granted, returnable Jan. 25, 1957.

Per Curiam.

ORDER

February 5, 1957. Rule absolute.

Per Curiam.

ORDER

February 23, 1957. Rule to show cause why prayer of within petition[†] should not be granted awarded, returnable Mar. 7, 1957.

Per Curiam.

ORDER

April 29, 1957. Rule discharged.

Per Curiam.

[* Petition of appellant to reverse court below and reinstate decision of Commission on authority of In re George E. Addison, reported in 385 Pa. 48 (1956).]

[† Petition of Appellee to reconsider and vacate the order entered February 5, 1957.]

EXCERPT FROM PHILADELPHIA HOME RULE CHARTER

Section 7-201. Appeals. The Civil Service Commission shall hear and dispose of appeals as provided in this section. Any employee who is dismissed or demoted after completing his probationary period of service, or who is suspended for more than ten days in any one year, may, within thirty days after such dismissal, demotion or suspension, appeal to the Commission for review thereof. Every appeal shall be heard promptly. Upon such review, both the appealing employee and the appointing authority involved shall have the right to be heard publicly and to present evidence; but technical rules of evidence shall not apply. The findings and decisions of the Commission shall be in writing and shall be certified to the Personnel Director.

If the Commission sustains the appeal on the ground that the action complained of was taken by the appointing authority for any political, religious or racial reason, or labor union activity lawful for municipal employees, it shall order the employee to be reinstated to his former position without loss of pay for the period of his suspension. In all other cases where the Commission sustains the appeal of the empl. . it shall order the reinstatement of the employee in his former position with or without loss of pay for the period of his suspension or direct that he be appointed to a position of equal status in the same office, department, board or commission with or without loss of pay for the period of his suspension. If the Commission overrules the appeal of the emplo ee, it shall confirm the action of the appointing authority which shall be final as of the date it was taken.

Findings and decisions of the Commission and any action taken in conformance therewith as a result thereof shall be final and there shall be no further appeal on the merits, but there may be an appeal to the courts on jurisdictional or procedural grounds.

ANNOTATION

Sources: A Model State Civil Service Law, Section 13.

Purposes: 1. The major function of the Civil Service Commission is to serve as an appellate tribunal in cases involving employees against whom disciplinary action by dismissal, demotion or suspension has been taken. The day-to-day administration of the civil service system is the responsibility of the Personnel Director.

2. The right to City employment is not an absolute one. On the other hand, employees lack many of the advantages and opportunities of employees engaged in private industry. The City is entitled to obtain the services for which it pays, but some measure of protection has to be afforded to an employee against whom disciplinary action is taken to assure that it is not arbitrary. This section approaches the problem on a b[illegible] which seeks to protect the interests of the City, the employee and the taxpayer.

3. An employee is given the right to appeal from action taken against him to the Civil Service Commission. He has this right in the case of any suspension for more than ten days, a limitation imposed to prevent the overburdening of appeal dockets. Upon an appeal, the employee is entitled to be heard publicly and to present evidence in his behalf but he may request a private hearing if he deems that desirable and the appointing authority accedes to his request. The latter qualification is necessary because the interests of the City may sometimes be served by a public hearing. Technical rules of evidence are not applicable because the proceeding is an administrative one and fairness to the employee and to the City requires that all facts pertaining to the case be presented regardless of any legal, exclusionary rules of evidence. Further protection is afforded to the City and to the employee by the requirement that the findings and decisions of the Commission must be

in writing. They are to be certified to the Personnel Director so that he may know what action, if any, must be taken.

4. An employee has an absolute right to reinstatement to his former position without loss of pay if his appeal is sustained on the grounds that the action taken against him was for any political, religious or racial reason, or labor union activity lawful for municipal employees. Merit principles of employment preclude action taken against an employee because of his political beliefs and tenets. Of course, where the reason is that the employee engaged in political action prohibited by the Charter, the rule stated does not apply. American traditions, the principles of this Charter, and a merit basis of employment preclude action against an employee because of his religious beliefs or his race. To the extent labor union activity by City employees is lawful, it cannot afford a basis for dismissal, demotion or suspension.

5. Whenever dismissal, demotion or suspension is for reasons other than those noted in the preceeding paragraph, it is the Commission's duty to decide whether the action appealed from was justified. If the Commission has jurisdiction and the procedure upon appeal meets the requirements of due process and of the Charter, the Commission's action whatever it may be, provided it conforms to the Charter, is determinative of the case, and is final. There may be no further appeal in any event on the merits of the case. The Charter precludes an independent review of the evidence by any court. The sole grounds to sustain a further appeal to the courts are lack of jurisdiction of the Commission, a failure of procedural due process, and a failure to conform with Charter requirements.

6. If the Commission overrules an appeal, the action of the appointing authority is to be confirmed and is to

be final as of the date it was taken. If the Commission sustains an appeal, the problem is more difficult. Complete fairness to the injured employee would require that he be reinstated in his former position. However, this may be disadvantageous to the City for the reasons leading to the disciplinary action taken, although not justifying such action, may be cause for disrupting routines and efficiency. The solution arrived at seeks to balance all interests involved. An employee dismissed, demoted or suspended for political, religious or racial reasons, or labor union activity lawful for municipal employees, is to be reinstated to his former position without loss of pay for the interest to be protected here is an absolute and fundamental one. In other cases, the Commission has the alternative of requiring reinstatement in the former position or in an equivalent position in the same unit of the government, depending on the circumstances of the case, with or without loss of pay. If reinstatement in the same position will tend to disrupt effective working conditions, the latter course will be indicated and the employee will still be protected against being assigned to a position the duties of which are unfamiliar to him, or to a position where there is no vacancy or which involved a reduction in rank or salary.

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IN THE

Supreme Court of the United States

No. 546

OCTOBER TERM, 1957

IN RE: APPEAL OF JOSEPH RETENELLER

APPEAL FROM THE SUPREME COURT OF PENNSYLVANIA

Motion to Dismiss Appeal

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IN THE

Supreme Court of the United States

No. 546

OCTOBER TERM, 1957

IN RE: APPEAL OF JOSEPH RETENELLER

APPEAL FROM THE SUPREME COURT OF PENNSYLVANIA

MOTION TO DISMISS APPEAL

Appellee moves this Honorable Court to dismiss the appeal in the above entitled case on the grounds that there are no substantial federal questions involved.

STATEMENT

Appellant, Joseph Reteneller, is a former Philadelphia policeman. On March 26, 1954, he was dismissed from the police force by the Commissioner of Police, because it was found that he had accepted "pay-offs" from a numbers racketeer, who operated in the area which he patrolled.

After lengthy hearings before it, the Philadelphia Civil Service Commission, on February 1, 1955, upheld the action of the Police Commissioner in dismissing appellant from his post. Appellant then appealed the Commission's decision to the Court of Common Pleas No. 7 of Philadelphia

County. Among the errors alleged in the appeal to that Court, were the contentions on which appellant bases his present claim of denial of due process, namely, that he was precluded from adequate cross examination, that appellant's case was improperly consolidated with that of two other discharged policemen, and that the evidence against him was presented to the Civil Service Commission by an assistant district attorney rather than an assistant city solicitor.

On November 10, 1955, the Common Pleas Court reversed the decision of the Civil Service Commission disagreeing with the Commission on the merits of the case. However, since the Philadelphia Home Rule Charter appeared to limit judicial review in appeals from the Civil Service Commission to questions of procedure and jurisdiction, the City of Philadelphia appealed the decision of the Common Pleas Court to the Supreme Court of Pennsylvania. The appeal is docketed in that Court as *In re: Appeal of Joseph Reteneller*, January Term, 1956, No. 141.

Argument of that appeal before the Pennsylvania Supreme Court was postponed, by agreement of counsel, pending a decision by that Court of another matter known as the *Addison Case*. The *Addison Case* concerned the dismissal of another Philadelphia police officer for accepting 'favors' from the numbers bankers who made payments to Reteneller and directly raised the issue of the scope of review in appeals from the Philadelphia Civil Service Commission.

On April 16, 1956, the Pennsylvania Supreme Court decided the *Addison Case*, 385 Pa. 48, 122 A. 2d 272 (1956), holding that Section 7-201 of the Philadelphia Home Rule Charter restricts the scope of judicial review of Common

Pleas Courts in appeals from the Philadelphia Civil Service Commission to questions of jurisdiction and procedure.

On October 28, 1956, relying on the *Addison* decision, the City filed with the Pennsylvania Supreme Court in the matter at bar a Petition for Ruling Reversing the Order of the Court Below. This petition set out at length that from the standpoint of procedure and legal principles involved the *Addison* and *Reteneller* cases were parallel situations and that the Common Pleas Court's decision in the present appeal should be reversed on the basis of the *Addison* decision. A copy of the Petition was served on appellant's former counsel on October 31, 1956.

In the meantime, the present counsel for appellant appealed the *Addison Case* to this Court on the grounds that the scope of review afforded by the Philadelphia Home Rule Charter, as interpreted by *Addison*, violated due process and impaired the obligation of contracts. This Court, on January 14, 1957, dismissed the *Addison* appeal for want of substantial federal question: *In re: George E. Addison*, 352 U. S. 956 (1956).

Subsequently, the Pennsylvania Supreme Court issued a Rule to Show Cause why the City's aforementioned Petition for a Ruling Reversing the Order of the Court Below in the *Reteneller* appeal should not be granted. Service of this rule was accepted by former counsel for Reteneller, but no Answer was filed to the City's Petition. On February 5, 1957, the Pennsylvania Supreme Court made the Rule absolute, which constituted a reversal of the order of the Common Pleas Court and a reinstatement of the action of the Civil Service Commission in dismissing Reteneller.

Thereafter, on February 15, 1957, appellant's present counsel entered his appearance in the *Reteneller* case for

the first time and filed with the Pennsylvania Supreme Court a Petition to Reconsider and Vacate its order of February 5, 1957. This novel petition was, in effect, a request that the Pennsylvania Supreme Court change its decision and overrule the Civil Service Commission decision. In his Petition, appellant set forth in detail the alleged procedural errors before the Commission. The Pennsylvania Supreme Court then granted a Rule to Show Cause why this Petition should not be granted. The City filed an Answer contending at length that appellant's position, that prejudicial procedural errors had occurred before the Commission, was meritless. Appellant lodged an extensive Replication in which he reasserted the alleged procedural irregularities on which his appeal to this Court wholly depends.

On April 29, 1957, the Pennsylvania Supreme Court discharged the rule on appellant's Petition. This terminated the appeal in favor of the City of Philadelphia. It is from the Court's order discharging the rule that appellant seeks to appeal to this Court.

ARGUMENT

I. APPELLANT'S CONTENTION THAT THE INSTANT DECISION OF THE PENNSYLVANIA SUPREME COURT CONSTRUES THE PHILADELPHIA HOME RULE CHARTER AS BARRING JUDICIAL REVIEW OF PROCEDURAL ERRORS BEFORE THE PHILADELPHIA CIVIL SERVICE COMMISSION IS ERRONEOUS.

Appellant argues that the Pennsylvania Supreme Court in the matter at bar has decided that the Philadelphia Home Rule Charter does not allow judicial review of procedural deficiencies before the Civil Service Commission. This contention can only be based on the assumption that appellant did not obtain such review in the matter at hand, because it is perfectly clear that the orders of the Pennsylvania Supreme Court involved in this case at no place even suggest such a construction of the Home Rule Charter. To the contrary, as appellant notes in his Jurisdictional Statement and as the Pennsylvania Supreme Court ruled in the *Addison Case*, supra, Section 7-201 of the Charter expressly provides for judicial review of asserted procedural errors before the Civil Service Commission.[1]

There is no basis whatsoever for contending that the Pennsylvania courts in the matter at hand did not consider the questions of procedure which appellant raises

[1] Section 7-201 of the Philadelphia Home Rule Charter, which relates to appeals from the Civil Service Commission, provides in part: "Findings and decisions of the Commission and any action taken in conformance therewith as a result thereof shall be final and there shall be no further appeal on the merits, but there may be an appeal to the courts on jurisdictional or procedural grounds."

before this Court. These matters were determined adversely to appellant by both the Common Pleas Court and the state Supreme Court.

In his appeal to the Court of Common Pleas, appellant filed eleven exceptions to the adjudication of the Civil Service Commission. Exceptions numbered two, three and four set forth the procedural matters which appellant presses on this Court as the basis for assuming jurisdiction of his appeal. The Order of the Pennsylvania Common Pleas Court, dated October 17, 1955, reversing the Civil Service Commission (printed on page 26 of the Jurisdictional Statement) expressly sustained some of appellant's exceptions relating to procedure and, by failing to sustain the others, rejected them. This Order shows clearly that all of the appellant's exceptions were considered by the Common Pleas Court. None of the exceptions to the alleged procedural irregularities, which appellant asserts before this tribunal, were considered of sufficient merit to be sustained.

More importantly, however, there can be no question that the Pennsylvania Supreme Court itself considered appellant's contentions with respect to improper procedure before entering its final orders in this appeal. This is manifest from a consideration of what took place before the Pennsylvania Supreme Court.

Appellant's original counsel, who had represented him from the outset before the Civil Service Commission, declined to file an Answer to City's Petition for a Ruling Reversing the Order of the Court Below, presumably because he concluded that appellant had no meritorious defenses. Thereafter, the Pennsylvania Court, on February 5, 1957, entered what ordinarily would have been a final

order disposing of the appeal. Despite this action, the Pennsylvania Supreme Court accepted the Petition to Reconsider filed by appellant's newly retained counsel on February 15, 1957, and granted appellant a Rule on the City to Show Cause why the Petition should not be granted. The Petition of appellant, the Answer to it filed by the City of Philadelphia and the appellant's Replication were concerned solely with the validity of appellant's contentions with respect to procedural errors before the Commission. In addition, throughout the proceedings in the Pennsylvania Supreme Court that tribunal had before it the entire record of the matter since its inception before the Civil Service Commission. In view of the foregoing, it seems beyond question that the Order of the state Supreme Court dismissing appellant's Petition to Reconsider was an adverse adjudication on the procedural contentions which appellant now urges before this Court.

In view of the deliberate attention which the procedural questions received before the Common Pleas Court and the state Supreme Court, it cannot be sensibly argued that the Orders in question of the Pennsylvania appellate court construe the Philadelphia Home Rule Charter as denying judicial review of these matters in appeals from the Civil Service Commission. Such a construction of the Charter would have been directly contrary to its express language and to the recent, well-considered decision of the same court in the *Addison Case*, supra, where the right to judicial review of errors in procedure or jurisdiction was upheld. No intention to nullify the review provisions of the Charter and to overrule its decision in *Addison*, can be imputed to the Pennsylvania court by anything it has said or done in the appeal at bar.

II. No Substantial Federal Question Is Involved in the Present Appeal.

Appellant seeks to have this Court assume jurisdiction of his appeal on the basis of three procedural irregularities that allegedly occurred before the Philadelphia Civil Service Commission (Jurisdictional Statement, pages 5, 6, and 7). None of appellant's contentions with respect to the asserted procedural deficiencies has any merit nor presents a substantial federal question.

In the first instance, appellant contends that he was denied adequate opportunity to cross-examine the principal witnesses against him. It has been regularly ruled, even in criminal cases where the rights involved are most jealously protected, that the scope of cross-examination rests in the discretion of the trial court. *Glasser v. United States*, 315 U. S. 60 (1942); *United States v. Migliorino*, 238 F. 2d 7 (3rd Cir. 1956); *United States v. Stoehr*, 196 F. 2d 276 (3rd Cir., 1952), *cert. denied*, 344 U. S. 826 (1952). As was said in the *Migliorino* case, supra, on page 11 of the official report:

> "It is within the discretion of the trial court to control the permissible latitude of cross-examination. Its rulings will be disturbed only on a clear showing of abuse of that discretion."

The fact of the matter is in the case at bar is that both prosecution witnesses were subjected to a most thoroughgoing and vigorous cross-examination by one of Philadelphia's ablest attorneys. For example, Freeman Mitchell, the principal witness, gave direct testimony which covered

less than twenty-eight pages of the notes of testimony, while cross-examination of this witness covered one hundred fourteen pages. (Notes of Testimony before the Civil Service Commission pages 5 to 32, 32 to 145.) Similarly, the other prosecution witness whose direct testimony was covered in fourteen pages was cross-examined by appellant's counsel for over forty pages of the notes (Notes of Testimony before the Civil Service Commission, pages 156-169, 169-211). Under the circumstances, as an examination of the cited portions of the notes of testimony will bear out, appellant's counsel had abundant opportunity and complete latitude in the cross-examination of the witnesses appearing against his client.

Appellant suggests that he was prevented from cross-examining the principal prosecution witness on the question of being motivated to testify against Reteneller because of personal hostility. While the Commission, on page 92 of the notes of testimony before it, limited the scope of cross-examination on this point, it subsequently, at page 114, invited appellant's attorney to resume examination along this tack, but he declined to do so. This failure to take advantage of the opportunity offered by the Commission cannot now be converted into a basis for appeal. Any error was unquestionably waived.

In addition, it is clear from a recent decision of the Court of Appeals for the Third Circuit that where the hearing tribunal permits counsel to follow an avenue of cross-examination previously closed to him any error is cured. In *United States v. Migliorino*, 238 F. 2d 7, 11 (3rd Cir. 1956), a criminal case, the trial judge had upheld at one point an objection to a certain line of cross-examination.

However, counsel was granted other opportunities to ask the same question. The Court of Appeals held in language wholly applicable to the instant matter as follows:

> "On two separate occasions, then, the defense was allowed to inquire searchingly of the government's witness whether or not he testified in the hope of receiving a more favorable sentence. It follows that the fair trial requirements of *United States v. Hogan*, supra, have been amply satisfied."

The Civil Service Commission's invitation to Reteneller's attorney to resume the questioning that had been restricted earlier is clearly within the above ruling.

Furthermore, no prejudice of any sort can be shown in the instant matter by reason of interrupting the sequence of cross-examination since the matter was heard by an expert panel of Commissioners rather than a jury.

From the foregoing, it appears beyond dispute that appellant has no complaint with respect to the scope of cross-examination allowed before the Civil Service Commission. However, even assuming *arguendo* that error occurred in this regard, it was not sufficiently grave that it could be considered as depriving appellant of his constitutional right to a fair hearing.

Appellant also now seeks to assign error to the Commission because it consolidated the hearing involving Reteneller with that of two other police officers who had been discharged for accepting bribes from the same numbers banker. The reason for hearing the three cases together was that the same prosecution witnesses were to testify against the three dismissed policemen, who were each represented by the same defense counsel. At the time of the hear-

ing, the advantages of consolidation were discussed by counsel and the Commission, and appellant's attorney stated that he had no objection to the consolidation. (Notes of Testimony before the Civil Service Commission, page 4.) Certainly, that statement waived any right to object subsequently to the agreed upon procedure in handling the cases.

Even absent the agreement of appellant's counsel, no error can be based on the consolidation. The proceedings in question were not before a jury, but before an experienced hearing board capable of discriminating between the testimony offered against the three discharged officers. In fact, appellant stood to profit from the joinder of the hearings, because any discrediting of the credibility of the witnesses with respect to the other officers would have redounded to his favor.

A case involving a strikingly analogous objection to consolidation of hearings seems to dispose of appellant's contention. In *N. L. R. B. v. United Mine Workers*, 198 F. 2d 389, 390 (4th Cir. 1952), the Court of Appeals for the Fourth Circuit had before it a case where it was charged that the Labor Relations Board, a body similar in nature to the Civil Service Commission, had erred in consolidating hearings on charges against six different union locals for unfair labor practices that took place at different locations. In upholding the Board's action in considering the cases together, the Court of Appeals reiterated the well-settled rule that:

> "The joinder of proceedings was a matter resting in the sound discretion of the Board . . ."

Appellee submits in the instant matter that in addition

to a clear waiver of objection to the consolidation of the hearings, no prejudice was suffered by appellant as a result of the joinder.

The last point put forward by appellant as warranting the present appeal is so obviously a question of local law that it calls for scant attention. It is argued that a denial of due process occurred because an assistant district attorney rather than an assistant city solicitor conducted the major part of the examination of witnesses against appellant before the Civil Service Commission. Appellant's own Jurisdictional Statement, at pages 6 and 7, admits that the question is one governed by the Philadelphia Home Rule Charter. The question of the title of counsel who participated in the proceedings has no bearing on appellant's constitutional rights.

As a factual matter, the Philadelphia Charter only requires that the City Solicitor's office supervise the institution of a case before the Commission.[2] This was fulfilled completely in the matter at hand. The City Solicitor was at all times in charge of the case and an assistant city solicitor was present throughout the hearings. An assistant district attorney, who had investigated the improper relationship between the dismissed officers and the racketeer who had corrupted them, was chosen to handle the examination of witnesses because of his familiarity with the situation. The use of his informed assistance was in compliance with the Charter mandate directing cooperation between City departments in the interests of efficiency and economy.[3]

In conclusion, it seems safe to say that the choice of

[2] Philadelphia Home Rule Charter, section 7-302(1).

[3] Ibid., section 8-401.

counsel by the City of Philadelphia in the case at hand has no relationship whatsoever to appellant's constitutional rights or to any question of federal law.

CONCLUSION

For all of the foregoing reasons, it is urged that appellant's Jurisdictional Statement fails to raise any substantial federal questions or to demonstrate that his claims of procedural error have not received full and adequate judicial review. Accordingly, his appeal should be dismissed.

Respectfully submitted

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